Supreme Court, U.S.
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No._____

In the
Supreme Court of the United States

WILLIAM C. BOYKIN, JR., Petitioner

-v-

ENTERGY OPERATIONS, INC., ET. AL., Respondents

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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30pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals was incorrect in upholding a summary judgment.

2. Whether the United States Court of Appeals followed the current legal standards with its ruling on res judicata as it applies in this case.

3. Whether the United States Court of Appeals' decision impermissibly raises the threshold for retaliation which is in direct conflict with other circuit courts.

4. Whether the United States Court of Appeals should have found actionable retaliation when Entergy placed petitioner in its performance improvement plan shortly after petitioner filed a lawsuit and placing petitioner in Block 9.

5. Whether the United States Court of Appeals award of cost against the petitioner discourages the exercise of challenging the evidence of material fact and the entire gamut of violation of the law as it pertains to individual civil rights.

PARTIES TO THE PROCEEDINGS

Petitioners

William C. Boykin, Jr.

Respondents

Entergy Operations, Inc., et. al and Mike Bakarich, Aziz Khanifar, Randy Hutchinson, Fred Walsh, Frank Wagar, and Don Hintz.

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued its consolidated published opinion affirming the United States District Court for the Western District of Mississippi upon William C. Boykin's case (*Boykin v. Entergy, Operations, Inc. et. Al*). The United States Court of Appeals for the Fifth Circuit granted appellees bill of cost over petitioner's objection. The United States District Court for the District of Western Mississippi ordered entry of the final judgment in Boykin v. Entergy, Inc. et. al on September 18, 1998. Copies of the memorandum orders are printed in the appendix at page 4a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its summary judgment on September 30, 1998 (App. At la). This Petition for Writ of Certiorari is being filed within 90 days of the affirmation of District Court's decision of dismissal. This Court's jurisdiction is invoked pursuant to 42 U.S.C. §§ 2000e..

The judgment of the district court in all aspects was affirmed by the United States Court of Appeals for the Fifth Circuit on April 16, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 USC § 2000E(1998)
§ 2000E Definitions

Federal Rule of Civil
Procedure 56(c)

Federal Rule of Appellate
Procedure 39

STATEMENT OF THE CASE

This case was filed as a result of retaliation by Entergy. Throughout this case, there has been an attempt by Entergy and the lower courts to merge these two cases and invoke res judicata. This process is faulty in that there were attempts by petitioner to make this retaliation a part of the discrimination case, but the case was dismissed before it could be amended Therefore the petitioner was forced to await EEOC Title VII right-to-sue to address the retaliation by filing a subsequent lawsuit.

The Petitioner allegations were substantiated by affidavit of Entergy tangible employment actions such as attempted demotions, disadvantageous assignments; sabotaging work assignments, refusals to promote, negative job evaluations, hostile working conditions up to and including the causation of a nervous breakdown.

However, the District Court and the Appellate Court despite the evidence, ruled against the appellant/petition the case was dismissed with prejudice in the District Court and affirmed in the 5th Circuit.

The Petitioner strongly disagree. A review of this judgment by the 5th Circuit of Appeals is sought. The was ordered April 16, 1999 for the 5th Circuit Court and the judgment date for the court of first instance the District Court is September 30, 1998.

A proof of service is sent to Defendants' counsel Wise, Carter, Carraway.

ARGUMENT FOR GRANTING WRIT

A United States Court of Appeals has entered a decision in conflict with the decisions of other United States Court of Appeals on the same important matter.

The United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

The Fifth Circuit Court of Appeals is erroneous in its affirming the district court's decision. Its decision is in conflict with the majority of the Circuit Courts in that it is extreme in its high threshold for unlawful

retaliation while ignoring all Title VII provisions that are designed to prevent this level of adverse employment action. The majority of the Circuits which have addressed this issue of retaliation hold that Title VII's protection against retaliation discrimination extends to adverse actions which falls short of ultimate employment decisions, but fall closer to tangible employment actions such as transfers, refusals to promote, etc.

This is important not only to the Petitioner, but it is important to others similarly situated in that something as important as this, the outcome should not be dictated by locale in the United States.

ARGUMENT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE COURTS FAILED TO FOLLOW THIS COURT'S CONTROLLING PRECEDENT ON SUMMARY JUDGMENT.

This motion for summary judgment by the defendant was incorrectly agreed to by the district judge. The continuance motion was filed and supported by affidavit facts. The judge should not have granted a summary judgment.

Even though the movant can at any time seek a summary judgment without supporting affidavits, it is incumbent upon the judge as officer of the court to determine whether or not a summary judgment should be granted. This judgment was granted while disregarding affidavit facts that contained material facts of the case. The district court broke precedence and issued a ruling that is in direct violation of Rule 56(f) of the Federal Rule of Civil Procedures.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issues of material fact exist. It is improper where the court merely believes it is unlikely that the non-moving party will prevail at trial. *National Stream Service Corp. V. Poster Exchange Inc. 305 f.2d 647, 651.*

Since "summary judgment is a drastic remedy, the procedural equivalent of a trial", it is not hyperbole to state that courts weigh such motions circumspectly. They require a thorough examination of all papers before the court . As noted above, the papers are construed most favorably to the party opposing the motion, and a motion must be denied if a fact issue is found to exist if there is any doubt as to the existence of a triable fact issue, or even where the point is reasonably arguable.

These triable and material facts were presented to the district court as reason for a motion to continue and as an affidavit. The district court erred in its oversight of this important evidence. As did the court of appeals as it did concur with the district court. Summary judgment is seldom appropriate where a case presents issues

involving state of mind or subjective feelings and reactions, such as motive, intent or good faith.

The defendant has failed to refute these content based retaliation allegations. Without a single piece of counter valine evidence and absent the opportunity to conduct discovery, cross examination, or any of the

other truth seeking procedures of a trial, it was impossible for the district court to determine as a matter of law that plaintiff's content based discrimination and retaliation claims are without merit or material fact. *Andre v. Pomeroy, Supra. 35 Ny2d at 364. Olsen v. Town of Richfield, Supra, 81Ny2d 1025\4. 1025. Rotuba Extruders v. Ceppos, Supra. Thomas v. Ronai, Supra 82 Ny2d at 537. Sillman v. Twentieth Century Fox Film Corp., 3Ny2d 395, 404.*

II

THE PETITION SHOULD BE GRANTED BECAUSE THE COURTS BELOW ARE AT A DIFFERENCE WITH OTHER COURTS AS FAR AS RETALIATION IS CONCERNED

The court of appeals in its concurrence with the actions of the district court cited (*Meeks v. Computer Associates Intern.*, 15 F.3d 1013, 1021 (11th Cir. 1994) (quoting EEOC v. Reichhold Chem., Inc., 988 F.2d 1571-72 (11th Cir. 1993). "This standard assumes, however that the employer has taken some action against the plaintiff that is otherwise actionable under Title VII." The appeals court goes on to state, "Because it is clear, as a matter of law, that Boykins (should be Boykin) has suffered no adverse employment action, we need not reach this issue on appeal."

The Court of Appeals in District Court seemingly glossed over one of the stipulations of Title VII, that being promotions and failure to promote. The defendant has continuously denied petitioner a promotion while promoting less qualified individuals. This is in direct violation of Title VII and constitutes an adverse employment action.

To establish the causal relation element of his prima facie case of retaliation, Boykin need only show that the protected activity and the adverse action are not wholly unrelated.

These actions were proven to be committed by Entergy through the affidavits presented to the court. Among these were failure to promote, a change in work assignments, compensation decisions, change in benefits and day-to-day harassment that led to petitioner leaving work for one year because of employment induced stress. But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employee's psychological well being, can and often will distract from employee's job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible affects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of work place equality (*Rogers v. EEOC*, 454 F.2d 234, 238 (CA5 1971).

There is a circuit split on this issue. While the Eighth Circuit has sided with the Fifth Circuit, see *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (only adverse employment actions that "rise to the level of an ultimate employment decision [are] intended to be actionable under Title VII."), the First, Ninth, and Tenth Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. See *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (stating that actions other than discharge are covered by Title VII's anti-retaliation provision and listing as examples, "employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees.") (internal citation omitted); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) (holding that such non-ultimate employment decisions as "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute `adverse employment decisions' cognizable under" Title VII's anti-retaliation provision); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996) (construing Title VII's anti- retaliation provision to reach beyond ultimate employment decisions and protect an employee from a malicious prosecution action brought by former employer). In addition, the D.C. Circuit has held that the Age Discrimination in Employment Act's anti-retaliation clause, which is identical to Title VII's, "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Passer v. American Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991). See also, *Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1994) (stating that the

ADEA's anti-retaliation provision covers more than discharge, demotion, or failure to promote and that a "case by case review" is necessary to determine whether an employer's actions rise to the level of adverse employment actions for purposes of stating a prima facie case of retaliation).

The majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. The Fifth and Eighth Circuits' contrary position is inconsistent with the plain language of 42 U.S.C. § 2000e-3(a), which makes it "unlawful to discriminate against any of his employees . . . because he has made a charge . . ." (emphasis added). Read in the light of ordinary understanding, the term "discriminate" is not limited to "ultimate employment decisions." Moreover, our plain language interpretation of 42 U.S.C. § 2000e-3(a) is consistent with Title VII's remedial purpose. Permitting employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees' willingness to file charges of discrimination.

No affirmative defense is available when the supervisor's harassment culminates in a tangible employment action.

III

THIS PETITION SHOULD BE GRANTED BECAUSE THE COURTS BELOW DID NOT ESTABLISH RES JUDICATA.

The target of the defendant's res judicata accusations is cause no. 5:95CV145BrN. This case was dismissed with prejudice on November 22, 1996 without petitioner's knowledge or authorization. The proceedings were carried out abruptly without warning.

Res judicata does not apply. There are four prerequisites for res judicata. 1) There must be a final judgment. 2) The judgment must be on the merits. 3) The claims must be the same in the first and second suits. 4) The parties in the second action must be the same as those in the first.

The petitioner agrees that there was a final judgment. However, petitioner disagrees with the other three items. The petitioner offered

affidavits which were totally ignored despite the affidavit showing evidence important to the case. The court issued a summary judgment. The claims in the first lawsuit was against the refusal of defendant to promote plaintiff because of race. The claim in the second lawsuit was retaliation and harassment which resulted because plaintiff filed the first law suit.

The claims that were made subsequent to the prior lawsuit were non-existent. The claims after the first lawsuit were filed based on Entergy Operations, Inc.'s actions subsequent to the first lawsuit

The matters present for decision now were, or might have been, litigated in the prior action (*Currier v. Cyr* 570 A.2d 1205, 1208). This situation did not exist and, as a result, could not have been litigated. These wrongful events were separated by time and function. Since the plaintiff has no obligation to expand his suit in order to add a claim that it could not have asserted at the time the suit was commenced, a later suit based on the subsequent conduct is not barred by res judicata (*Sec v. First Jersey Security Inc.*, 101 F.3d at 1463-64).

However, plaintiff made attempts to amend lawsuit. Plaintiff filed complaint with EEOC on May 2, 1996 and October 17, 1996 and was granted a right to sue on February 12, 1997. Plaintiff sought administrative relief through EEOC but the February 12, 1997 granting of the right to sue letter came too late to amend last lawsuit. Plaintiff had no choice but to file a subsequent lawsuit and include EEOC charges. The amendment to EEOC complaint dated February 5, 1997 was filed because of harassment and retaliation by defendant. This treatment resulted in plaintiff having to leave work because of employment related stress.

The petitioner disagrees with the last item because the parties are not the same. The first lawsuit named Entergy Operations, Inc. The second named Entergy Operations, et.al. Which includes officers of Entergy which under Title VII provisions, they can be so designated.

Since the defendant claims the cases to be same, it is an opportune time to mention that there have been developments in cause actions 5:95CV145BrN. It seems as though there are some irregularities in the above case. Petitioner has filed a motion for relief from judgment under Rule 60(b)(3). There is some question as to the judge and his relationship with the defendant, Entergy Operations, Inc. at the time (1995-1996) of this case proceeding.

IV

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE COURTS BELOW DID NOT DEFEND ITS POSITION ON ITS AGREEMENT THAT THE PETITIONER WAS CORRECTLY PLACED IN BLOCK 9 AND ON PERFORMANCE IMPROVEMENT PLAN AFTER FILING A LAWSUIT

The petitioner filed a lawsuit in October 1995 and was placed in Block 9 in March 1996. The decision by Entergy, Operations, Inc. had no factual substantiation. The decision was made arbitrarily.

The Court of Appeals in its zeal to agree with the District Court glossed over the petitioner's affidavit facts in regards to its decision concerning job performance. Entergy Operations, Inc. used job performance as the reason for placing petitioner in Block 9. The petitioner, upon rebuttal, showed the court beyond a doubt the fallacy of Entergy's claims. The Court of Appeals chose to ignore this evidence and actually found no fault with the Block 9 punishment even though the petitioner plainly defended his position. The petitioner was eventually placed in a performance improvement program without there actually being a need. There was no deficiency in performance. Entergy sited petitioner had no potential, but when asked what potential, Entergy did not and could not reply.

An employer who selectively cleans house cannot hide behind convenient euphemisms such as down-sizing or stream-lining. Whether or not trimming the fat from a company's organizational chart is a prudent practice in a particular business environment, the employer's decision to eliminate specific positions must not be taunted by a discriminatory animus (*Maresco v. Evans Chemetics* 964 F.2d 106, 111).

V

THIS PETITION SHOULD BE GRANTED BECAUSE THE COURTS BELOW AWARDED AGAINST THE PETITIONER PARTICULARLY WHERE THE DISTRICT COURT IGNORED THE AFFIDAVIT FACTS AND DISMISSED THE CASE WITH PREJUDICE.

Under Federal Rule of Appellate Procedure 39, The Court of Appeals taxed William C. Boykin for the cost of the appellee's brief and appendices.

Tax and cost against Title VII plaintiff serves to discourage review of important issues such as those presented in the petitioner's case.

The Court of Appeals should not have assessed appellee's cost to the petitioner. Much of the appellee's brief and record were devoted to attempting to discredit the appellant's statement of the record of facts on appeal. The petitioner not only presented a proper and sufficient record in his appeal briefs, but also successfully countered the appellee's attempt to discredit the petitioner's presentation of facts by providing the Court of Appeals with proper sites in its reply brief.

CONCLUSION

This Court should intervene in this case before a precedent is established by the Court of Appeals. The precedent is to the extreme as it compares with other Courts of Appeals and should be moderated by this Court. The Court of Appeals and the District Court have consistently evaded the evidence of discrimination and retaliation experienced in the work place especially when race is under consideration.

The Court of Appeals consistently ignores Title VII complaints when race is an issue.

This Court should enforce the provisions of Title VII and clarify the threshold of retaliation so that it is consistent throughout the Courts of Appeals.

Respectfully submitted,

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DATE: 9-18-99

(Any footnotes trail opinion)

No. 98-60676

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIAM C. BOYKIN
Plaintiff-Appellant,

versus

ENTERGY OPERATIONS, INC.; AZIZ KHANIFAR,
Individually and in their official capacity
as supervisors officers and/or agents of
Entergy Operations, Inc.; MIKE BAKARICH,
Individually and in their official capacity
as supervisors officers and/or agents of
Entergy Operations, Inc.; RANDY HUTCHINSON,
Individually and in their official capacity
as supervisors officers and/or agents of
Entergy Operations, Inc.; FRED WALSH,
Individually and in their official capacity
as supervisors officers and/or agents of
Entergy Operations, Inc.; FRANK WAGNER,
Individually and in their official capacity
as supervisors officers and/or agents of
Entergy Operations, Inc.; DON HINTZ,
Individually and in their official capacity
as supervisors officers and/or agents of

Defendants-Appellees.

JUDGES: JOLLY, SMITH, and WIENER, Circuit Judges.
PER CURIUM:*

The Appellant, William C. Boykins, proceeding pro se, appeals the district court's grant of summary judgment in favor of Entergy Operations, et al[1]., on his claims for race discrimination and unlawful

retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. In granting Entergy's motion for summary judgment, the district court first applied the doctrine of res judicata and dismissed each of Boykins's claims that alleged race discrimination of retaliation up to November 18, 1996. The district court then addressed Boykins's remaining claims for unlawful retaliation. The district court concluded that summary judgment was proper as to these claims because Boykins failed to establish a prima facie case, namely that he suffered no adverse employment action, and that his protected activity was the "but for" cause of the adverse employment decisions.

On appeal, Boykins argues that the district court erred in granting summary judgment against him because he established a prima facie cases of unlawful retaliation. Boykins contends that he suffered an adverse employment action when Entergy instructed him to either transfer to another work site, take part in a performance improvement program, or "accept a constructive discharge." Boykins argues that when he refused each of the three options, he was placed in a "clock nine category," and later subjected to "disparate conditions and a hostile environment." Boykins further contends that he was issued a March 5, 1998 termination letter, which provided that he would be terminated in one month if his performance did not improve. Finally, Boykins argues that the causal requirement for this retaliation claim is met because Entergy took the aforementioned actions immediately after he filed the instant Title VII suit.

As a threshold matter, we agree with the district court that the doctrine of res judicata precludes each of Boykins's claims alleging race discrimination and retaliation for the period of time extending through November 18, 1996. We are satisfied that each of these claims could have been adjudicated in Boykins's previous Title VII race discrimination suit against Entergy, which was filed on October 19, 1995, and subsequently dismissed on November 18, 1996. See *Jackson v. Widnall*, 90 F.3d 710, 715 n.8 (5th Cir. 1996) citing *Nilsen v. City of Moss Point*, 701 F.2d 556, 560 (5th Cir. 1983) (en banc). We turn now to address the merits of Boykins's retaliation claim.

We have previously explained that to defeat a motion for summary judgment on an unlawful retaliation claim, the plaintiff must show that there exists a conflict in substantial evidence on the ultimate issue for the trier of fact–whether the adverse employment action would not have

occurred "but for" the plaintiff's protected activity. *Long v. Eastfield College*, 88F.3d 300, 308 (5th Cir. 1996) (citing *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc). This standard assumes, however, that the employer has taken some action against the plaintiff that is otherwise actionable under Title VII. Because it is clear, as a matter law, that Boykins has suffered no adverse employment action, we need not reach this issue on appeal.

We analyze adverse employment actions in a stricter sense than some other circuits. *Burger v. Central Apartment Management*, No. 98-10290, 1999 WL 101392, at *4 (5th Cir. March. 16, 1998). The record is clear that the block nine ranking that Boyd complains of on appeal is tantamount to a low performance review or negative evaluation[2]. A low performance ranking, in and of itself, has only a tangential effect on the conditions of employment and, consequently, it does not rise to the level of an adverse employment action. See Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 373 n.11 (5th Cir. 1998), cert. denied, 119 S.Ct. 798 (1999) (citing Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997), cert. denied, 118 S.Ct. 336 (1997). We likewise conclude that the mere threat of transfer fails to qualify as an adverse employment action. Mattern, 104 F.3d at 708; Burger v. Central Apartment Management, No. 98-10290, 1999 WL 101392, at *4 (5th Cir. Mar. 16, 1998). At best, this threat constitutes an "interlocutory" or "mediate" act, which is outside the purview of the Title VII. See Mattern, 104 F.3d at 708. Regarding the March 5, 1998 warning letter, it seems that Boykins failed to exhaust his administrative remedies with the EEOC. In any event, the law is clear that a threat or "final warning" of termination has no immediate impact on a plaintiff's working conditions, so as to constitute an adverse employment action. Id.

In sum, Boykins has failed to show that Entergy took any action against him akin to the ultimate employment decisions that Title VII was designed to address – "hiring, granting leave, discharging, promoting and compensating." Burger, 1999 WL, at *3 (citing Mattern, 104 F.3d at 708). Because Boykins's summary judgment proof fails in his regard, our inquiry ends here. We therefore do not address his remaining arguments on appeal. We thus conclude that the district court did not err in granting summary judgment in favor of Entergy.

The judgment of the district court in all aspects is

AFFIRMED.

CIVIL ACTION NO. 3:97-CV-348WS

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI - JACKSON DIVISION

WILLIAM C. BOYKIN, JR., Plaintiff – Appellant v. ENTERGY OPERATIONS, INC., MIKE BAKARICH, AZIZ KHANIFAR, RANDY HUTCHINSON, FRED WALSH, FRANK WAGNER AND DON HINTZ, Individually and in their Official Capacity as Supervisors, Officers and/or Agents of Entergy Operations, Inc. – Defendants – Appellees

September 30, 1998, Filed

COUNSEL: Pro Se

JUDGE: Henry Wingate

OPINION BY: Henry Wingate

TACHA, Circuit Judge

MEMORANDUM OPINION AND ORDER

Before the court is the motion of the defendants, Entergy Operations, Inc., (*EOI*), Aziz Khanifar (*Khanifar*), Mike Bakarich (*Bakarich*), Randy Hutchinson (*Hutchinson*), Fred Walsh (*Walsh*), Frank Wagner (*Wagner*), and Don Hintz (*Hintz*) to dismiss this lawsuit pursuant to Rule 12(b)(1) and (6), Federal Rules of Civil Procedure. Alternatively, the defendants move this court to grant them summary judgment pursuant to Rule 56, Federal Rules of Civil

Procedure. Also Rule 12(b) of the Federal Rules of Civil Procedure provides:

For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is south may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

The court assumes that plaintiff's motion for continuance is brought pursuant to Rule 56(f) of the Federal Rules of Civil Procedure which states: "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

While the plaintiff pleading is entitled "Motion for Continuance," he states no grounds or reasons for this court to grant a continuance but merely responds to the defendants' motion to dismiss.

Title 42 U.S.C. § 2000e-2(a) provides: "It shall be an unlawful employment practice for an employer–

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

the defendants: 1) changed job descriptions to favor white employees; 2) wrote biased appraisals beginning in 1990 in preparation for dismissals and layoffs of black employees; 3) kept secret files for the purposes of demoting, terminating, and withholding promotions; 4) hired and promoted white employees over black employees with more education and experience; 5) arbitrarily changed job titles in such a way as to detrimentally affect black employees in favor of white employees; 6) denied black employees with seniority promotions since 1985; 7) paid and promoted white employees more than black employees in similar employment; 8) operated segregated departments at the Grand Gulf facility; 9) retaliated against, harassed, and ridiculed [unnamed] for filing EEOC complaints; 10) assigned [unnamed] additional work without additional compensation; 11) moved the plaintiff to a different work area

and excluded the plaintiff from department meetings based on the color of his skin; 12) subjected [unnamed] to constant monitoring inconsistent with that of white employees similarly situated; 13) paid whites more than blacks site-wide and gave different standards of performance; 14) repeatedly turned down the plaintiff (since 1986, when plaintiff spoke out against the non-promotion of blacks) for promotions while promoting less qualified white employees; 15) gave white employees higher appraisals based on subjective standards; and 16) failed to live up to nondiscrimination contract with federal government.

On October 10, 1995, in the United States District Court for the Southern District of Mississippi, the plaintiff filed a case similar to the one now before the court. In that case, the plaintiff sued only EOI alleging violations of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e), Title 42 U.S. C. § 1981, and Title 32 U.S.C. § 1988. Specifically, plaintiff alleged in his 1995 case that the defendant: 1) denied plaintiff a promotion to the position of Technical Specialist III, in September 1994, and filled the position with less qualified white employees;
2) denied the plaintiff a promotion to the Technical Specialist III position in January 1993 whereby plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission (*EEOC*); 3) engaged in a patter and practice of race discrimination in violation of Title VII and Title 42 U.S.C. § 1981; 4) retaliated against the plaintiff in September 1994 by refusing to promotion plaintiff. By an agreed order between the parties, Boykin and EOI, the lawsuit was dismissed with prejudice on November 18, 1996.

Courts may dismiss a claim under Rule 12 of the Federal Rules of Civil Procedure if a plaintiff can prove no set of facts which would entitle him to the relief for which he prays. *Rankin v. Witchita Falls, Tex.*, 762 F.2d 444, 446 (5th Cir. 1985). In reviewing the case, the court should accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992).

The plaintiff has named Khanifar, Bakarich, Hutchinson, Walsh, Wagner, and Hintz ad defendants to this lawsuit in both their individual and official capacity. It is clear that Title VII was not intended by Congress to be used to impose individual liability on employees. In *Grant v. Lone Star Co.* 21 F.3d 649, 652 (5th Cir. 1994), quoting *Miller v. Maxwells Int'l Inc.*, 991 F.2d 583, 584 (9th Cir. 1993), cert denied. 510

U.S. 1109 (1994), the Fifth Circuit explained that it is "'inconceivable that Congress intended to allow civil liability to run against individual employees,' the smallest legal entities." The Fifth Circuit reasoned that since the definition of "employer" under Title 42 U. S. C. § 2000e(b) includes any "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks, one who is not an "employer" under the statute's definition cannot be held individually liable. Grant, 21 F.3d at 651. Accordingly, this court lacks subject matter jurisdiction over the plaintiff's claims against the named defendants in their individual capacity, and such claims are dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

SUMMARY JUDGMENT

The court reviews the remaining claims of the plaintiff under the summary judgment standard of Rule 56 of the Federal Rules of Civil Procedure. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Hirras v. National R. R. Passenger Corp.*, 95 F.3d 396, 399 (5th Cir. 1996) (quoting Fed.R.Civ.P. 56(c)). The party seeking summary judgment carries the burden of demonstrating that there is no evidence to support the non-movant's case. Hirras, 95 F.3d at 399. In ruling on a motion for summary judgment, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 1505, 2511, 91 L.Ed.2d 202 (1986). Rather, "it is the province of the jury to access the probative value of the evidence." *Dennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). "Summary judgment can be granted only if everything in the record demonstrates that no genuine issues of material facts exist." Id. It is improper where the court merely believes it is unlikely that the non-moving party will prevail at trail. *National Stream Serv. Corp, v. Poster Exchange, Inc.*, 305 F.2d 647, 651 (5th Cir. 1962). However, the facts that are irrelevant or unnecessary to a decision are "non-material" and do not prevent summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106, S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265 (5th cir. 1987). In order to

survive a motion for summary judgment, the plaintiff must show a genuine issue of material fact on each of the elements of his prima facie case. *Pegues v. Emerson Electric Co.*, 913 F.Supp. 976, 979 (N.D. Miss. 1990), citing *Chiari v. City of League City*, 920 F.2d 311, 314-15 (5th Cir. 1991).

DISCRIMINATION

The doctrine of res judicata bars all claims that have been adjudicated in a previous suit. *Nilsen v. City of Moss Point*, 701 F.2d 556, 559 (5th Cir. 1983) (en banc). "Application of the doctrine is proper only if the following four requirements are met: (1) the parties must be identical in the two actions; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must be a final judgment on the merits; and (4) the same cause of action must be involved in both cases." *Eubanks v. FDIC*, 977 F.2d 166, 169 (5th Cir. 1992), citing Nilsen, 701 F.2d at 559; *Russell v. SunAmerica Securities, Inc.*, 962 F.2d 1169 (5th Cir. 1992); *Meza v. General Battery Corp.*, 908 F.2d 1262, 1265 (5th Cir. 1990).

Since the court has dismissed the named defendants in their individual capacity, the parties are identical. A stipulation such as the one dismissing the plaintiff's previous lawsuit with prejudice can act as a final adjudication on the merits and bar all future suits brought by the plaintiff on the same cause of action. *Samuels v. Northern Telecom, Inc.*, 942 F.2d 834, 836 (2d Cir. 1991) (citation omitted). A judgment is res judicata not only to the matters decided by it, "but as to all relevant issues which could have been but were not raised and litigated in the suit." *Heiser v. Woodruff*, 327

U.S. 726, 735, 66 S.Ct. 853, 857, 90 L.Ed. 970 (1946) (citation omitted). According to the Fifth Circuit, "the critical issue is not the relief requested or the theory asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts." *Agrilectric Power Partners, Ltd. v. General Electric Co.*, 20 F.3d 663, 665 (5th cir. 1994).

The application of the doctrine of res judicata requires this court to dismiss all of the plaintiff's Title VII claims which were previously brought on October 10, 1995, and subsequently dismissed on November 18, 1996. In the lawsuit now before this court, the plaintiff alleged in his complaint, with very little detail or specifics, that the defendants violated Title VII. Many of these allegations seem to allege wrongful conduct and harm caused by the defendants upon all black employees at EOI. However, the plaintiff failed to bring his lawsuit in the form of a class action suit pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Thus, he has no standing to represent anyone other than himself. Furthermore, all of the plaintiff's claims alleging race discrimination and retaliation up to November 18, 1996, are dismissed under the application of the doctrine of res judicata, because all such claims could have been brought in the previous lawsuit.

RETALIATION

Plaintiff's remaining claims, alleging retaliation, are likewise dismissed because plaintiff fails to meet the summary judgment proof necessary to show a genuine issue of material fact with regard to all elements of his prima facie case. To prevail on a claim of retaliation, the plaintiff must first prove by the preponderance of the evidence a prima facie case, showing that: (1) he was engaged in activity protected by Title VII; (2) that an adverse employment action occurred; and (3) there was a causal connection between his participation in the protected activity and the adverse employment decision. *Jones v. Flagship International*, 793 F.2d 714, 724 (5th Cir. 1986), cert. Denied, 479 U.S. 1065 (1987). In other words, he must show that "but for" his engaging in the protected activity, he would not have suffered the adverse action. *McDonald v. Temple Independent School Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985). The plaintiff's speculation and belief as well as his bald conclusions are insufficient to make his prima facie showing. EEOC v. Exxon Shipping Co., 745 F.2d 967, 976 (5th Cir. 1984). If he proves a prima facie case, the burden then shifts to EOI to articulate a legitimate business rationale for the employment actions. If EOI succeeds, then the plaintiff must prove by a preponderance of the evidence that EOI's rationale was a pretext for discrimination in order to prevail. Long v. Eastfield College, 88 F.3d 300, 305 (5th cir. 1996).

Plaintiff has failed to show that an adverse employment action actually occurred. Through affidavits and other documents presented to the court, EOI has shown legitimate business rationale for all of the actions which plaintiff claims were retaliatory. For instance, the reports of the EEOC indicate that the white employees promoted were qualified for the positions that they were assigned. Other than speculation, the plaintiff has not come forward with any competent evident to show that EOI was motivated by a discriminatory reason with regard to any action it took toward the plaintiff. Since the plaintiff has failed to show either a genuine

issue of material fact as to each element of his retaliation claim or pretext, the court finds that summary judgment is appropriate with regard to all remaining claims.

IT IS, THEREFORE, ORDERED AND ADJUDGED that defendants' motion dismiss the named defendants in their individual capacity is granted.

IT IS FURTHER ORDERED AND ADJUDGED that defendants' motion for summary judgment on all of plaintiff's remaining claims of discrimination and retaliation is granted.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff's motion for continuous is denied.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's lawsuit be dismissed with prejudice. The court will enter a final judgment in accordance with the Local Rules.

SO ORDERED AND ADJUDGED, this the 30th day of September 1998.

Henry T. Wingate
UNITED STATES DISTRICT JUDGE

No. 98-60676

UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

WILLIAM C. BOYKIN, JR., Plaintiff – Appellant v. ENTERGY OPERATIONS, INC., MIKE BAKARICH, AZIZ KHANIFAR, RANDY HUTCHINSON, FRED WALSH, FRANK WAGNER AND DON HINTZ, Individually and in their Official Capacity as Supervisors, Officers and/or Agents of Entergy Operations, Inc. – Defendants – Appellees

Before JOLLY, SMITH, and WIENER, Circuit Judges.

In an opinion entered April 16, 1999, this court affirmed the District Court's orders for summary judgment on all claims. Under this circumstance, certain costs of the appeals may be taxed pursuant to FRAP39. Appellee's claim verified and documented cost of copying and binding the briefs and appendices. Appellee's bill of cost in Appeal No. 98-60676 is granted in the amount of $101.40.

Enclosed for the district court and counsel is the approved bill of cost.

Charles R. Fulbruge, III
Clerk

1. Boykins also sued Aziz Khanifar, Mike Bakarich, Randy Hutchinson, Fred Walsh, Frank Wagner and Don Hintz individually and in their official capacities as Entergy supervisors. The district court correctly dismissed Boykin's claims against these named defendants on the grounds that Title VII does not impose liability on individuals who do not meet the statutory definition of "employer." Grant v. Lone Star Co., 21 F.3d 649, 652-53 (5th Cir. 1994) (citations omitted).

2 The block nine ranking is one of the lowest ranked categories in a ranking scheme used by Entergy in 1995 and 1996 to access its employees' comparative performance and potential.